NEW YORK LAW SCHOOL

NYLS Journal of Human Rights

Volume 1
Issue 1983 *Symposium-The Enforcement of Human Rights Norms: Domestic and Transnational Perspectives*

Article 10

1983

Federal Legislation Prohibiting Sex Discrimination in Employment, Education, and Credit

Laura Buckley

NOTE

FEDERAL LEGISLATION PROHIBITING SEX DISCRIMINATION IN EMPLOYMENT, EDUCATION, AND CREDIT

TABLE OF CONTENTS

I. INTRODUCTION

The intent of the proposed Equal Rights Amendment was to ensure equality of rights under the law and to eliminate sex as a basis for discrimination.[1] If ratified, the ERA would have mandated the revision or repeal of federal and state laws treating women and men differently and directly incorporated the concept of sexual equality into judicial interpretation.[2] On June 30, 1982, the period for ratification of the proposed ERA expired. Although thirty-five states endorsed the amendment, without

1. R. RATNER, EQUAL EMPLOYMENT POLICY FOR WOMEN 2 (1980).

2. B. BROWN, A. FREEDMAN, H. KATZ & A. PRICE, WOMEN'S RIGHTS AND THE LAW; THE IMPACT OF THE ERA ON STATE LAWS 1 (1977).

approval of the required thirty-eight, the measure was defeated.

In light of the ERA's defeat, it is important to examine the adequacy of existing federal legislation protecting women from sex discrimination and to determine whether a broad national policy is still necessary. This note discusses the scope of federal statutes prohibiting sex discrimination in employment, education and credit. Also presented are the models of proof used to establish sex discrimination, the burden of proof under these models and the difficulties encountered in proving discrimination. Recent case law is reviewed to provide an understanding of the courts' interpretation and treatment of this legislation. This article also explores legal questions not yet addressed by the courts and issues on which lower courts presently conflict.

II. Discrimination in Employment

Title VII of the Civil Rights Act of 1964,[3] as amended by the Equal Employment Opportunity Act of 1972[4] and the Pregnancy Discrimination Act of 1978,[5] prohibits employer practices that discriminate against workers in matters of hiring, discharge, compensation, or terms of employment because of the worker's race, religion, sex, or national origin.[6] The Act applies to any private employer, with at least fifteen employees, in an industry affecting interstate commerce[7] and is applicable to federal, state, and local governmental employers as well. Title VII also makes it unlawful for an employer to segregate or classify by race, religion, sex, or national origin in any manner adversely affecting the employee's job status.[8] The Act is administered by the Equal Employment Opportunity Commission (EEOC) with ultimate enforcement by suit in a U.S. District Court by a private indi-

3. 42 U.S.C. §§ 2000e--2000e-17 (1976 & Supp. V 1981).

4. Pub. L. No. 92-261, 86 Stat. 103 (1972). The Equal Employment Opportunity Act of 1972 extensively amended Title VII of the Civil Rights Act of 1964. The Act authorized the Equal Employment Opportunity Commission to bring actions directly against respondents in federal district court when conciliation efforts prove fruitless. Prior to the Act, an aggrieved individual had to pursue the case on her own. The 1972 Amendments also enlarged the coverage of Title VII to reach smaller employers having at least fifteen employees.

5. Pub. L. No. 95-555, § 1, 92 Stat. 2076; 42 U.S.C. § 2000e(k) (Supp. V 1981).

6. 42 U.S.C. § 2000e-2(a)(1) (1976).

7. 42 U.S.C. § 2000e(b) (1976).

8. 42 U.S.C. § 2000e-2(a)(2) (1976).

vidual, the EEOC or the Attorney General. The EEOC has authority to investigate complaints and decide whether unlawful discrimination has occurred. Before filing suit, however, the EEOC must attempt conciliation of Title VII claims.

Courts interpreting Title VII have permitted plaintiffs to establish discrimination claims by showing either disparate treatment or disparate impact. In the sex discrimination area, most of the major developments have occurred through disparate treatment litigation. The Supreme Court has noted that, conceptually, the theory of disparate treatment[9] is the most easily understood type of discrimination.[10] The employer simply treats some people less favorably because of their race, color, religion, sex, or national origin. Proof of an employer's discriminatory motive is critical in a disparate treatment claim, although in some cases the intent to discriminate can be inferred from the mere fact of differences in treatment.[11]

A. Disparate Treatment

In *McDonnell Douglas v. Green*,[12] the Supreme Court set forth the order and allocation of proof for establishing whether a discriminatory motive exists. First, the plaintiff must prove by a preponderance of the evidence that the employer's acts constitute a prima facie case of discrimination. To establish a prima facie case of disparate treatment, the plaintiff must prove four elements: (1) membership in a protected group; (2) that she applied and was qualified for a job for which the employer was seeking applicants; (3) that despite her qualifications she was rejected; and (4) that after her rejection, the position remained open and the employer continued to seek applications from persons with plaintiff's qualifications.[13] The establishment of the prima facie case under the McDonnell Douglas model creates a

---

9. The disparate treatment model of Title VII is based on section 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1976), which provides that it is an unlawful employment practice "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" because of race or sex.

10. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

11. *Id.*

12. 411 U.S. 792 (1973).

13. *Id.* at 802.

presumption of illegal discrimination by eliminating the most likely legitimate case for the employer's action—a lack of minimum qualifications and the absence of a job opening.

Once the plaintiff establishes a prima facie case and, therefore, a presumption of discrimination, the burden shifts to the employer to articulate some "legitimate, nondiscriminatory reason" for the disparate treatment.[14] The nature of the burden which shifts to the employer to rebut a prima facie case was clarified by the Supreme Court in *Texas Department of Community Affairs v. Burdine*.[15] The employer's sole obligation at this second stage is simply to articulate a legitimate, nondiscriminatory reason rather than establish by a preponderance of the evidence that its proffered reason was the real reason for its action, or that the person selected was more qualified than the plaintiff.[16]

If the employer articulates a legitimate reason for disparate treatment, the applicant must then prove that the employer's rationale is merely a pretext for intentional discrimination.[17] *Burdine* reemphasizes that the ultimate burden of persuasion remains with the plaintiff and does not shift at any point to the defendant.[18] The defendant's burden of production in rebutting a prima facie case of sex discrimination only requires him to raise a genuine issue of fact—he need not persuade the court he was actually motivated by the articulated reason.[19]

The female plaintiff in *Burdine* proved prima facie discrimination by a preponderance of the evidence. She was hired as an accounting clerk in the Public Service Careers Division (PSC) of the Texas Department of Community Affairs (TDCA). Burdine received a promotion six months later, and following the subsequent resignation of her supervisor, was given additional duties. The following year PSC, funded completely by the United States Department of Labor, was reorganized to remedy inefficiencies, as a condition of the continued funding of the program. To reduce the PSC staff, the defendant discharged Burdine

14. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254-56 (1981).
15. *Id.* at 248.
16. *Id.* at 254-56.
17. *Id.* at 254.
18. *Id.*
19. *Id.* at 255.

along with two other employees and retained only one professional employee, a male. Burdine brought suit, alleging that the decision to terminate her was discriminatory and in violation of Title VII.

The Supreme Court in *Burdine* reversed the decision of the lower court. The Fifth Circuit had placed an evidentiary burden on the employer greater than the simple articulation standard, reasoning that ". . . if an employer need only articulate, not prove, a legitimate nondiscriminatory reason for his action, he may compose ficticious, but legitimate reasons for his action."[20] The court then referred to two prior Fifth Circuit decisions[21] in which it had developed two rules for a defendant to successfully rebut a prima facie Title VII case. One rule required the defendant to prove that the individual hired or promoted was better qualified for the position than the plaintiff.[22] The other rule required the defendant to prove the nondiscriminatory reason by a preponderance of the evidence.[23]

The Supreme Court's decision in Burdine overruled both of these Fifth Circuit decisions which placed a heavier burden of proof on the employer.[24] After *Burdine*, the evidentiary burden required of a defendant in a disparate treatment claim is the burden of production. The burden of proof remains at all times with the plaintiff.

Disparate treatment of women may occur in hiring, firing, discipline, promotion, transfer, layoff, compensation, training, job assignment, and sexual harassment. *Burdine* serves as an example of sex discrimination in the context of job termination. In *Perryman v. Johnson Products Company*,[25] female employees brought a class action against their employer, claiming disparate treatment in its hiring, promotion and firing practices. The plaintiffs introduced statistics indicating that historically the

---

20. 450 U.S. at 257-58 (quoting Turner v. Texas Instruments Inc., 555 F.2d 1251, 1255 (5th Cir. 1977)).

21. Turner v. Texas Instruments, Inc., 555 F.2d 1251 (5th Cir. 1977); East v. Romine, Inc., 518 F.2d 332 (5th Cir. 1975).

22. Burdine v. Texas Department of Community Affairs, 608 F.2d 563, 567 (5th Cir. 1979), *rev'd*, 450 U.S. 248 (1981).

23. *Id.* at 567.

24. 450 U.S. at 255-66.

25. 532 F. Supp. 373 (N.D. Ga. 1981).

sales force of the company had been staffed by males.[26] The employer failed to articulate a nondiscriminatory reason for its practice of refusing to hire and promote women into the sales organization of the company. The court concluded that the company's practices violated Title VII. The court also found the company unlawfully retaliated against two of its female employees by firing them after they filed a sex discrimination charge with the EEOC.[27]

In *Commonwealth v. Flaherty*,[28] female members of a city police department brought a sex discrimination claim, alleging disparate treatment in the hiring and training practices of the department. The plaintiffs established a prima facie case of discrimination, proving that from the time of their hiring as policewomen, they were treated differently from their male counterparts. The policewomen were excluded from firearms training, which was a prerequisite to being promoted to the position of graded detective. The reason given by the police department for excluding these women from such training programs was that those women hired prior to 1975 were not hired as police officers but as "policewomen" and had not received all the required training. The court found, however, that the job title "policewoman" had been abolished in 1973 and replaced by the title police officer. Also noted by the court was the plaintiffs' willingness to participate in all required training. The court concluded that the police department had failed to articulate a legitimate nondiscriminatory reason for its actions, and that the plaintiffs had therefore met their burden of proving sex discrimination.[29]

The plaintiffs in *Perryman* and *Flaherty* were able to meet their burden of proving discrimination because the employers failed to articulate a nondiscriminatory reason for their actions. But because employers can usually satisfy the burden of articulating some "legitimate nondiscriminatory reason" for the action in question, most disparate treatment cases turn on the plaintiff's ability to demonstrate that the employer's nondiscriminatory reason is pretextual.[30] There are three categories of evi-

---

26. *Id.* at 375.
27. *Id.* at 377.
28. 532 F. Supp. 106 (W.D. Pa. 1982).
29. *Id.* at 110.
30. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 14 (2d ed. 1983)

dence which the plaintiff can use to prove pretext: (1) direct evidence of discrimination, such as discriminatory statements; (2) statistical evidence; and (3) comparative evidence.[31]

Direct evidence of discriminatory motivation is relatively unusual.[32] In *Capaci v. Katz & Besthoff, Inc.*,[33] however, job advertisements which indicated the employer's hiring practices were viewed as direct evidence of the employer's discriminatory motive. Capaci and the EEOC brought suit against Katz & Besthoff, Inc. (K & B), a drugstore company in New Orleans, alleging discrimination in the hiring and promotion of females into management positions. The EEOC relied on the content and placement of job vacancy advertisements in newspapers as evidence of discrimination.[34] The Fifth Circuit held that the advertising evidence of the employers hiring practices, while not determinative, was useful and probative in establishing discriminatory motivation.[35] In addition to the advertising evidence in *Capaci,* there was strong statistical evidence. During the 1965-1972 period, all 267 individuals promoted to the position of manager trainee were male.[36]

Statistics concerning a defendant's employment policy and practices, while not dispositive in an individual disparate treatment case, may be helpful in proving pretext. In *Sweat v. Miller Brewing Co.*,[37] the plaintiff, a woman over forty, was discharged from her position as an industrial relations representative and replaced by two younger males. After bringing a sex and age discrimination claim, the plaintiff sought statistical information regarding the sex and age of persons employed by Miller Brewing as industrial relations representatives and managers. The lower

---

[hereinafter cited as EMPLOYMENT DISCRIMINATION LAW].

31. *Id.* at 15.

32. *Id.*

33. 711 F.2d 647 (5th Cir. 1983).

34. *Id.* at 659. K & B's advertisements for management positions requested "qualified young men"; for Personnel Director K & B sought "a vital aggressive man who is ready to realize his potential." In contrast, for non-management positions, K & B advertised positions for "counter girls" and "salesladies." Even when gender-neutral in content, advertisements for manager trainees were routinely placed in the "Help Wanted—Male" column, whereas advertisements for secretaries, salesladies, and cashiers were placed in the "Help Wanted—Female" column.

35. *Id.* at 662.

36. *Id.*

37. 708 F.2d 655 (11th Cir. 1983).

court denied plaintiff's motion to compel discovery of the statistical information and the plaintiff appealed. The Eleventh Circuit reversed, holding that statistical information concerning an employer's general policy and practice regarding the employment of a protected group may be relevant in showing pretext and therefore discoverable, even in a case alleging an individual instance rather than pattern and practice of discrimination. The court also noted that liberal discovery rules should be applied in Title VII litigation.[38]

Comparative evidence is frequently used to demonstrate an employer's discriminatory motivation.[39] The plaintiff introduces evidence showing that in a comparable factual situation, the employer treats individuals of one group less favorably than individuals of another.[40]

The plaintiffs in *Chescheir v. Liberty Mutual Insurance Co.*[41] used comparative evidence to demonstrate the pretextual nature of the defendant's reason for firing them. The defendant stated that it discharged the plaintiffs, two female employees, because they violated a company rule prohibiting adjusters and first-year supervisors from attending law school. The plaintiffs introduced evidence which established that the company's "law school rule" was enforced discriminatorily on the basis of sex. The evidence indicated that despite widespread rumors that two male employees were attending law school, the employer chose not to confirm his suspicions about their activities. Other evidence showed that a third male employee was told, at the time he was hired, that he could attend law school. In contrast, the employer energetically investigated the women he suspected were attending law school and immediately terminated those found violating the rule. The Fifth Circuit found that the employer discriminated in subjecting female employees to a more rigid enforcement of the rule.[42]

The plaintiff in *Martinez v. El Paso County*[43] used comparative evidence to demonstrate the pretextual nature of the em-

38. *Id.* at 658.
39. EMPLOYMENT DISCRIMINATION LAW, *supra* note 30, at 15.
40. *Id.*
41. 713 F.2d 1142 (5th Cir. 1983).
42. *Id.*
43. 710 F.2d 1102 (5th Cir. 1983).

ployer's reason for terminating him. Martinez, the only male employee in a clerical position at the El Paso Juvenile Probation Department, was discharged from his job when the department was reorganized. Martinez brought a sex discrimination suit and proved a prima facie case. The employer's articulated reason for firing Martinez was that he lacked the necessary typing skills to perform the job. The plaintiff then offered evidence that a female employee whose typing skills were inferior to his was retained by the employer. Martinez also introduced evidence that the retained female employee was less cooperative, less experienced, and had less seniority than himself. The Fifth Circuit held that the plaintiff proved the employer's articulated reason for his dismissal was pretextual.[44] The court noted that a plaintiff can prove an employer's discriminatory intent by demonstrating either (1) that a discriminatory motive more likely motivated the employer, or (2) that the employer's explanation is unworthy of belief.[45]

Some courts have permitted employers to articulate a subjective factor as their nondiscriminatory reason for rejecting a job candidate. In *Verniero v. Air Force Academy School District #20*,[46] the plaintiff alleged that the defendant discriminated against her in selecting males for two positions for which she applied, Director of Special Education and Principal. The employer had specified three requirements for the position of principal but hired a male lacking the third requirement, despite the fact that Verniero met all three. The employer's articulated reason for not selecting Verniero was that it doubted "her ability to get along with people."[47] Verniero argued that the articulated reason was purely subjective. The Tenth Circuit held that the plaintiff failed to prove that the defendant's articulated reason was pretextual.[48] The dissent, however, concluded that Verniero had rebutted the employer's nondiscriminatory reason for her rejection. The use of subjective factors by an employer, argued the dissent, supports an inference of pretext, particularly where an applicant from a protected group is objectively better quali-

44. *Id.*
45. *Id.*
46. 705 F.2d 388 (10th Cir. 1983).
47. *Id.* at 392.
48. *Id.*

fied for the position.[49]

Courts have also accepted the "exercise of traditional management prerogatives" as a legitimate reason for an employer's actions. The plaintiff in *Sweeney v. Research Foundation of State University of New York*[50] alleged that she was denied appointment as a systems analyst because of her sex. Sweeney, employed in another area of the Research Foundation, had requested a transfer to the systems analyst position in 1972. At that time there were no openings in the department, but when positions were available the following year, Sweeney was not offered one. The employer's reason for not offering the job to Sweeney was that, in the interim, she had successfully embarked upon a new career in the Foundation's publications division. The Second Circuit held that the employer's exercise of traditional management prerogatives was nondiscriminatory, and that the plaintiff failed to persuade the court that the employer's acts were motivated by discrimination.[51]

Proving disparate treatment does not ensure that a sex discrimination victim will receive a fair remedy. In *Ford Motor Co. v. EEOC*,[52] the Supreme Court decided the proper remedy for a victim of disparate treatment in hiring. Writing for the majority, Justice O'Connor concluded that a rejected job applicant's obligation under Title VII to minimize damages requires the applicant to accept an unconditional offer of the job originally sought, even if that offer does not include retroactive seniority.[53]

The plaintiffs in *Ford* were three women who were turned down for auto industry jobs because of their sex. The women filed discrimination charges against Ford Motor Company (Ford) and found work elsewhere. Ford later offered the plaintiffs the jobs it had previously denied them, but did not offer the seniority the plaintiffs would have earned had they been legally hired when they first applied for the positions. Because they were granted neither seniority nor job security, the plaintiffs refused the job offers.

By the time of trial, the plaintiffs had been laid off from

---

49. *Id.* at 394 (McKay, J., dissenting).
50. 711 F.2d 1179 (2d. Cir. 1983).
51. *Id.* at 1187.
52. 458 U.S. 219 (1982).
53. *Id.*

jobs found after Ford's initial refusal to hire them, and the trial court held that they were entitled to compensation for the period after Ford's offer as well as before it. The Fourth Circuit affirmed, reasoning that without a promise of retroactive seniority, the defendant's job offer was "incomplete and unacceptable."[54] The Supreme Court reversed the Fourth Circuit's decision and held that the company's job offer was sufficient to release Ford from further liability.[55]

Justice O'Connor's opinion emphasized Title VII's "primary objective"—to end employment discrimination.[56] To accomplish this objective, she reasoned, the rules for implementing Title VII should encourage defendants to make prompt unconditional job offers to discrimination claimants.[57] Tolling the accrual of back pay liability when the defendant offers the claimant the job originally sought without accrued seniority, the Court noted, serves the objective of ending discrimination by giving an employer an incentive to hire the Title VII claimant.[58] The Court concluded that the rule adopted by the Fourth Circuit, requiring an employer to offer the discrimination claimant retroactive seniority, fails to provide such an incentive because it makes hiring the Title VII claimant more costly than hiring another applicant.[59]

The majority's employer-oriented approach to the issue reflects a lack of empathy for the problems of women in the nonprofessional and blue-collar work force. In dissent, Justice Blackmun maintained that the majority's approach encourages employers to make "cheap offers" to victims of the employer's past discrimination.[60] The Court's decision, Blackmun argued, violates Title VII's objective of making discrimination victims "whole."[61] Had the plaintiffs accepted Ford's job offers, the dissent noted, they would have been denied two years of seniority and would have enjoyed lower wages, less eligibility for promotion and transfer, and greater vulnerability to layoffs than per-

54. Ford Motor Co. v. EEOC, 645 F.2d 183 (4th Cir. 1981), *rev'd*, 458 U.S. 219 (1982).
55. 458 U.S. at 241.
56. *Id.* at 228.
57. *Id.*
58. *Id.* at 229.
59. *Id.*
60. *Id.* at 249 (Blackmun, J., dissenting).
61. *Id.* at 250 (Blackmun, J., dissenting).

sons hired after the plaintiffs were unlawfully refused employment.[62]

Sexual Harassment

Title VII disparate treatment claims may relate to sexual harassment when it operates as a term or condition of employment for an individual.[63] To date, there has been no Supreme Court ruling on a case involving sexual harassment.

In *Bundy v. Jackson*,[64] the District of Columbia Circuit significantly extended sex discrimination law, holding that sexual harassment of a female employee by male supervisors in itself constitutes a violation of Title VII.[65] Prior to *Bundy*, the decision in *Barnes v. Costle*[66] represented the majority view. In *Barnes*, the District of Columbia Circuit held that allegations of sexual harassment, when coupled with an adverse employment consequence, make out a prima facie case of sex discrimination under Title VII.[67] To establish a prima facie case of sexual harassment subsequent to *Barnes* but prior to *Bundy*, a woman had to show an adverse career consequence linked directly to the rejection of sexual advances from a superior authorized to make employment decisions. *Bundy*, however, eliminates any requirement that plaintiff prove she resisted the harassment and that an adverse employment consequence resulted from the resistance.[68]

The court in *Bundy* also held that the *McDonnell Douglas* burden of proof standards should be relaxed in sexual harassment cases in favor of plaintiffs and made more stringent for defendants.[69] According to *Bundy*, after the employee establishes a prima facie case of sexual harassment, the burden shifts to the employer to prove, by clear and convincing evidence, that its decision was based on legitimate, nondiscriminatory grounds.[70] If the employer succeeds in meeting that burden, the

62. *Id.*
63. 42 U.S.C. § 2000e-2(a) (1976).
64. 641 F.2d 934 (D.C. Cir. 1981).
65. *Id.* at 942.
66. 561 F.2d 983 (D.C. Cir. 1977).
67. *Id.* at 990.
68. 641 F.2d at 948.
69. *Id.* at 952.
70. *Id.*

employee must then prove the employer's reason is pretextual.[71]

Although *Bundy* significantly extends the decision in *Barnes*, it may be distinguished on its narrow facts in future decisions.[72] In *Bundy*, the plaintiff was sexually harassed by a coworker and various supervisors.[73] When she complained to her supervisors' superior, he too propositioned the plaintiff.[74] The plaintiff then filed a formal complaint with the department director, who made no attempt to investigate the situation. A question not resolved in *Bundy* is: what extent of harassment is necessary to constitute a Title VII cause of action? The sexual harassment in *Bundy* occurred repeatedly and was not discontinued after the plaintiff's complaints. In future sexual harassment cases, the existence of sexual harassment may not be as apparent or as repetitious as in *Bundy*.

Similar to *Bundy* is the Eleventh Circuit's decision in *Henson v. City of Dundee*,[75] which held that a Title VII claim is established when sexual harassment is sufficiently pervasive as to alter the conditions of employment and create an abusive working environment.[76] The *Henson* court identified five elements a plaintiff must prove to establish a Title VII violation based on sexual harassment when there is no tangible job detriment:[77] (1) respondeat superior;[78] (2) the plaintiff belongs to a protected group; (3) the harassment was based on sex; (4) the plaintiff was subjected to unwelcome sexual harassment; and (5) the harassment affected a "term, condition, or privilege" of employment. The court concluded that the state of psychological well-being is a "term, condition, or privilege" of employment within the meaning of Title VII.[79]

The Eleventh Circuit, in *Phillips v. Smalley Maintenance Services, Inc.*,[80] relied on *Henson* in determining that the plain-

71. *Id.* at 953.
72. *Annual Survey of Labor Law*, 23 B.C.L. REV. 268 (1981).
73. 561 F.2d at 939-40.
74. *Id.*
75. 682 F.2d 897 (11th Cir. 1981).
76. *Id.* at 901.
77. *Id.* at 903-05.
78. For a general discussion of the respondeat superior principle, see W. PROSSER, LAW OF TORTS 458-91 (4th ed. 1971).
79. *Id.* at 904 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)).
80. 711 F.2d 1524 (11th Cir. 1983).

tiff was subjected to sexual harassment during her employment and wrongfully terminated as a result of the harassment.[81] Phillips, employed by Smalley Maintenance Services (SMS), was fired for refusing to engage in sexual activities with the president of the company. The court concluded that the sexual harassment consisted of the effect on the plaintiff's psychological well-being during her employment at SMS as well as her wrongful termination.[82]

An employer who has knowledge of sexual harassment by its supervisory personnel is liable for the harassment. The Fourth Circuit, in *Katz v. Dole*,[83] stated that once a plaintiff makes a prima facie showing that sexual harassment took place, the most difficult legal question will typically concern the responsibility of the employer for the harassment.[84] The court distinguished two types of sexual harassment: (1) harassment creating an offensive environment ("condition of work"); and (2) harassment in which a supervisor demands sexual consideration in exchange for job benefits.[85] In "condition of work" cases, the court concluded, the plaintiff must demonstrate that the employer had actual or constructive knowledge of the existence of a sexually hostile working environment and failed to take prompt and adequate action to correct the problem.[86]

The plaintiff in *Katz*, a former federal air traffic controller, brought suit claiming she had been subjected to sexual harassment by employees at the Federal Aviation Administration (FAA), including her immediate supervisor and other supervisory personnel. Katz alleged that the FAA workplace was pervaded with sexual slurs and innuendoes and that she was the object of verbal sexual harassment. When Katz brought the harassment to the attention of her immediate supervisor, he responded with further sexual harassment. Katz then reported the harassment to her supervisor's superior who reacted with indifference.

The court held that Katz proved that her employer had no-

81. *Id.* at 1529.
82. *Id.*
83. 709 F.2d 251 (4th Cir. 1983).
84. *Id.* at 255.
85. *Id.* at 254.
86. *Id.* at 255.

tice of the harassment and made no efforts to correct the situation.[87] The court noted that a plaintiff may demonstrate employer notice by proving either that complaints were lodged or that the harassment was so pervasive that employer awareness may be inferred.[88]

The EEOC has issued Guidelines on Discrimination because of Sex,[89] which include sexual harassment.[90] These Guidelines were issued in response to increased complaints by female employees both of sexual harassment and of employer retaliation against women who refused sexual advances. The Guidelines define sexual harassment as follows:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[91]

Also delineated by the Guidelines are the notice requirements imputing liability to employers for the actions of their supervisors and employees. The Guidelines expand employer liability, holding the employer responsible for acts of sexual harassment between fellow employees[92] and for acts by non-employees[93] in the workplace. The notice requirements necessary to impute employer liability, however, are stricter when a co-worker is involved than when advances are made by supervisory personnel.[94] When co-workers are the harassers, the employer is liable only if the employer "knows or should have known of the

87. *Id.* at 256.
88. *Id.* at 255.
89. 29 C.F.R. § 1604 (1983).
90. *Id.* at § 1604.11.
91. *Id.* at § 1604.11(a).
92. *Id.* at § 1604.11(d).
93. *Id.* at § 1604.11(e).
94. *Compare id.* at § 1604.11(c) *with* 29 C.F.R. § 1604.11(d).

conduct."[95] In addition, the employer is provided with a defense if it takes "immediate and appropriate corrective action."[96] There is almost no case law holding an employer liable for co-worker harassment. It remains to be seen whether courts will impose employer liability only where the employer knew of the conduct of its supervisors yet failed to take action, or whether the more expansive employer liability concept expressed in the EEOC Guidelines will be adopted by courts.[97]

Courts have found that firing an employee for poor work performance which results from sexual harassment violates Title VII. In *Lamb v. Drilko Division*,[98] the District Court for the Southern District of Texas held that the decline in the plaintiff's work performance was a direct result of sexual harassment by her supervisor.[99] The court noted that the employer had, in effect, created the problem of the employee's poor work performance by failing to respond promptly to the employee's complaints about her supervisor.[100]

Requiring female employees to wear sexually provocative uniforms which subject them to verbal and physical harassment from the public also violates Title VII. In *EEOC v. Sage Realty Corp.*,[101] the court held that the defendant violated Title VII by discharging the plaintiff for refusing to comply with the employer's dress policy.[102] The employer insisted that the employee, a lobby attendant, wear a revealing and sexually provocative uniform which subjected her to sexual harassment. The court concluded that employers may no longer engage in conduct which allows women to be treated as sex objects.[103]

---

95. 29 C.F.R. § 1604.11(d) (1983).

96. *Id.*

97. *See* BUREAU OF NATIONAL AFFAIRS, INC., SEXUAL HARASSMENT AND LABOR RELATIONS II (1981).

98. 32 Fair Empl. Prac. Cas. (BNA) 105 (S.D. Tex. 1983).

99. *Id.* at 107.

100. *Id.*

101. 507 F. Supp. 599 (S.D.N.Y. 1981).

102. *Id.* at 611.

103. *Id.* at 610 n.16.

B. Disparate Impact

A disparate impact claim of discrimination,[104] unlike a disparate treatment claim, does not require proof of the employer's discriminatory motive.[105] The focus in a Title VII disparate impact claim is on the consequences of employment criteria and practices. An employment practice or test, which is facially neutral but operates to exclude a disproportionate percentage of a protected class, violates Title VII unless the employer establishes that the practice is justified as a business necessity. Although the adverse impact model may be used in individual cases, it is most often used in class actions because, by definition, the employment practice in question must affect a protected group rather than just an individual.

The Supreme Court first articulated the disparate impact model of discrimination in *Griggs v. Duke Power Co.*[106] Some commentators consider *Griggs* the most important court decision in employment discrimination law.[107] The Court in *Griggs* held that an employer's requirement of a high school diploma and a satisfactory score on two aptitude tests, which excluded black applicants at a substantially higher rate than whites, violated Title VII because the employer did not prove that the employment tests or diploma requirement were job related.[108] The Supreme Court noted that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[109]

Griggs and its progeny have established a three-part analysis of disparate impact claims. First, the plaintiff must establish a prima facie case of discrimination by showing that a facially

---

104. The disparate impact model of Title VII liability is based on section 703(a)(2), 42 U.S.C. § 2000e-2(a)(2) (1976), which forbids an employer "to limit, segregate, or classify" employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" because of race or sex. *Id.* at § 2000e-2(a)(2) (1976).

105. Proof of discriminatory purpose is not necessary to prove the unlawfulness of discriminatory procedures, for Title VII considers "the consequences of employment practices, not simply the motivation." Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

106. 401 U.S. 424 (1971).

107. EMPLOYMENT DISCRIMINATION LAW, *supra* note 30, at 5.

108. 401 U.S. at 432-33.

109. *Id.* at 431.

neutral employment practice has a substantial adverse impact on a protected group. At this stage, the burden of proof is on the plaintiff. If a showing of discriminatory impact is made, the employer must then demonstrate that the employment practice or selection device is job related or otherwise constitutes a business necessity. It has not yet been resolved whether, at this stage, the defendant has a burden of production or persuasion. Following *Burdine*, the Third Circuit held that the plaintiff in a disparate impact case also bears the burden of persuasion at all times.[110] The Fifth and Ninth Circuits, however, have held that *Burdine* does not apply to adverse impact cases and that the defendant has a burden of persuasion at the second stage in an adverse impact claim.[111] If the employer establishes job-relatedness or another form of business necessity at the second stage, the plaintiff must prove, at the third stage, that there are other tests or selection devices with lesser adverse impact which would equally serve the employer's needs.[112]

Courts have found a variety of employment criteria and practices which have an adverse impact on women. Minimum height and weight requirements as well as certain physical agility requirements have been found to impact adversely on female job candidates. An employer using these requirements must therefore demonstrate a business necessity for them. In *Dothard v. Rawlinson*,[113] the Supreme Court rejected an employer's minimum height and weight requirements for the position of prison guard, where neither was shown to be job related.[114]

An employer's requirement that job applicants have a minimum amount of work experience, when that requirement has a disparate impact on women and is not justified by business necessity, violates Title VII. In *Kilgo v. Bowman Transportation*,[115] a trucking company required that job candidates have one year of "over-the-road" driving experience. The company ar-

---

110. Croker v. Boeing Co., 662 F.2d 975, 991 (3d Cir. 1981) (en banc) (defendant's rebuttal burden is to "come forward with evidence to meet the inference of discrimination raised by the prima facie case").

111. Hung Ping Wang v. Hoffman, 694 F.2d 1146 (9th Cir. 1982); Johnson v. Uncle Ben's Inc., 657 F.2d 750 (5th Cir. 1981).

112. McDonnell Douglas Corp. v. Green, 411 U.S. at 801.

113. 433 U.S. 321 (1977).

114. *Id.*

115. 31 Fair Empl. Prac. Cas. (BNA) 1451 (N.D. Ga. 1983).

gued that the requirement was adopted to reduce its accident rate and insurance costs. The women challenging the requirement proved the existence of a less discriminatory alternative—the use of a trainee program such as the one previously used by the company. The court held that the company's requirement had a disparate impact on women,[116] finding a dramatic underrepresentation of women among the company's over-the-road drivers, even after adjusting for the fact that women may not be interested in such jobs to the same degree as men.[117] The court also concluded that the company had not shown the requirement was justified by a business necessity.[118]

The Uniform Guidelines on Employee Selection Procedures were jointly adopted in 1978 by the EEOC, the Civil Service Commission, the Department of Labor and the Department of Justice.[119] The Uniform Guidelines provide the current "framework for determining the proper use of tests and other selection procedures" to help employers comply with Title VII's prohibition against discriminatory employment practices.[120] The Guidelines provide that if an employer's selection process for a job does not have an adverse impact on a protected group, "in usual circumstances," it will be unnecessary to validate the individual components of the selection process.[121] This "bottom line"[122] approach was rejected, however, by the Supreme Court in *Connecticut v. Teal.*[123]

In *Teal,* Connecticut's state welfare agency used a multicomponent selection process in considering candidates for a job promotion. The first component, a written examination which constituted a "pass/fail barrier" to further consideration for promotion, had an adverse impact on black applicants. The pass rate for black candidates was only about 68% of the pass rate

116. *Id.*
117. *Id.* at 1457.
118. *Id.* at 1467.
119. EMPLOYMENT DISCRIMINATION LAW, *supra* note 30, at 92.
120. *Id.* at 93.
121. *Id.*
122. Under the "bottom line" theory, an employer using an employment criterion that has an adverse impact on a group protected by Title VII can defend on the ground that the adverse impact is offset by other measures and that the final result is an appropriately balanced work force. *See* Blumrosen, *Bottom Line in Equal Employment Guidelines: Administering a Polycentric Problem,* 33 AD. L. REV. 323 (1981).
123. 457 U.S. 440 (1982).

for white candidates. Despite the adverse impact of the written exam, the employer promoted enough of the black candidates who did pass the test to attain an appropriate balance in its work force—the "bottom line." At the "bottom line," 22.9% of the black candidates were promoted as compared to 13.5% percent of the white candidates. The Justice Department joined Connecticut in arguing that the selection process did not actually deprive disproportionate numbers of blacks of promotions.

The Supreme Court held, 5-4, that a nondiscriminatory "bottom line" may not be asserted by an employer as a defense.[124] A non-job related test which has a disparate impact and which constitutes a pass/fail barrier, the Court reasoned, unlawfully classifies employees into two categories—those eligible and those not eligible for promotion.[125] Such a test violates Title VII despite an employer's efforts to compensate for its discriminatory effect. The Court concluded that Title VII protects every "individual employee" against discriminatory treatment at every step in the selection process.[126]

In dissent, Justice Powell argued that the majority's decision blurs the distinction between disparate treatment and disparate impact cases.[127] Absent a disparate impact on a protected group, insisted the dissent, there can be no violation of Title VII on the basis of the disparate impact model.[128]

The disparate impact model should not be used to challenge multiple employment practices simultaneously, nor should it be used to challenge any employment practice merely because an imbalance in the composition of a work force exists. The Fifth Circuit, in *Pouncy v. Prudential Insurance Co. of America*,[129] noted that the disparate impact model is not "the appropriate

---

124. *Id.* at 456.

125. *Id.* at 452.

126. *Id.* at 453-56. *But see* Costa v. Markey, 706 F.2d 1 (1st Cir. 1982), where the court held that a hiring barrier does not have a disparate impact on a protected group when competition for the job is only among members of that protected group.

127. 457 U.S. at 459 (Powell, J., dissenting).

128. *Id.* at 459 (Powell, J., dissenting). The "bottom line" theory may not be obsolete for all purposes. In a footnote, the majority pointed out that the Uniform Guidelines regard the "bottom line" as a tool for the EEOC in deciding whether to take enforcement action. But while the EEOC may choose not to sue an employer without "bottom line" liability, the employer may still be confronted with a private lawsuit challenging an aspect of its selection procedure. 457 U.S. at 453 n.12.

129. 668 F.2d 795 (5th Cir. 1982).

vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices."[130]

Pouncy, a black male, initiated a class action against his employer, Prudential, alleging that Prudential had discriminated against its black employees by systematically failing to promote them. Pouncy attempted to establish that three employment practices—the failure to post job openings, the use of a level system, and the use of subjective criteria to evaluate employees—accounted for the racial imbalance in Prudential's work force.[131]

The Fifth Circuit emphasized that use of the disparate impact model requires a plaintiff to identify a specific selection procedure responsible for the adverse impact.[132] This enables the employer to respond by proving the legitimacy of the employment practice attacked.[133] The court acknowledged that the statistics presented by Pouncy showed an overrepresentation of blacks in the lower levels of Prudential's work force.[134] But because Pouncy failed to prove a causal connection between the challenged employment practices and racial composition of Prudential's work force, the court found that he had not established employment discrimination based on the disparate impact model.[135] The court also noted that a subjective classification practice that depends on the employer's discretionary decisions is not included within the category of facially neutral practices.[136] The court indicated, however, that it would have placed a burden of persuasion on the employer to justify the legitimacy of the challenged employment practices had Pouncy established a prima facie case of discrimination under the disparate impact model.[137]

Having found that the disparate impact model was not appropriate for the plaintiff's claim, the court analyzed the case under the disparate treatment model, for which a showing of

130. *Id.* at 800.
131. *Id.* at 799.
132. *Id.* at 800.
133. *Id.* at 801.
134. *Id.*
135. *Id.* at 800.
136. *Id.*
137. *Id.* at 801-02.

discriminatory intent is necessary.[138] The court then concluded that Pouncy's statistics failed to establish that Prudential's black employees were victims of disparate treatment.[139]

In *Carpenter v. Stephen F. Austin State University*,[140] the Fifth Circuit, relying on *Pouncy*, applied a disparate treatment rather than a disparate impact model to the plaintiff's sex and race discrimination claim.[141] *Carpenter* involved a class of service/maintenance and clerical employees who brought a sex and race discrimination suit against their employer, Stephen F. Austin State University. The plaintiffs alleged that the University systematically assigned and promoted women and blacks into lower-paying jobs.

The trial court analyzed the evidence under the disparate impact model and found that the University had unlawfully "channelled" blacks and women into lower-paying positions as a result of specific employment practices. The court concluded that the University had created a racially stratified and sexually stereotyped work force, in which blacks were primarily employed as janitors, cooks, and groundskeepers, and women were assigned to clerical positions. The channelling was attributed to three employment practices: educational qualifications for job assignments and promotions not proved to be job-related; systematic lower compensation for blacks and females by rates set in the Classified Pay Plan;[142] and subjectivity in initially assigning and promoting employees.

On appeal, the Fifth Circuit reasoned that its prior decision in *Pouncy* required that subjective employment practices, such as the University's systematic lower compensation and its subjectivity in assigning and promoting employees, were not facially neutral practices.[143] The court concluded that the latter two practices should have been analyzed under the disparate treatment model and remanded the case to the trial court for a find-

138. *Id.* at 802.

139. *Id.* at 802-05.

140. 706 F.2d 608 (5th Cir. 1983).

141. *Id.* at 620-21.

142. *Id.* at 625. The court concluded that the University's Classified Pay Plan was marred by discretionary decisions on job ranking (level of pay primarily) as determined by the all white, predominantly male, committee administering the plan.

143. *Id.* at 620.

ing of discriminatory intent.[144] The court indicated that were it not for the Fifth Circuit's prior decision in *Pouncy*, it would have applied the disparate impact model to the case.[145]

C. *Wage Discrimination*

Equal Pay Act

Sex discrimination in compensation is prohibited by the Equal Pay Act of 1963 (EPA),[146] an amendment to the Fair Labor Standards Act of 1938,[147] as well as by Title VII and, for government contractors, by Executive Order 11375.[148] The EPA requires employers to pay members of both sexes the same wages for substantially equal work, except when the wage differential is pursuant to one of four specified exceptions: (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex.[149]

Unlike Title VII, the EPA is limited to sex discrimination in compensation and does not address discrimination in other aspects of employment such as hiring, firing, promotion, or sexual harassment. The EPA is administered by the EEOC but, in contrast to Title VII, the Act contains no requirement that the EEOC conciliate claims before filing suit.[150]

To establish a prima facie case of wage discrimination under the EPA, the plaintiff is required to show that the employer pays different wages to employees of opposite sexes for equivalent work. The plaintiff must prove that the jobs being compared require equal skill, effort and responsibility, and are performed under similar working conditions.[151] The defendant

---

144. *Id.*

145. *Id.*

146. 29 U.S.C. § 206(d) (1976).

147. S. REP. No. 176, 88th Cong., 1st Sess. 2 (1963).

148. Exec. Order No. 11,375, 41 C.F.R. 60-20 (1983).

149. 29 U.S.C. § 206(d)(1) (1976).

150. EEOC v. Home Economy, 712 F.2d 356 (8th Cir. 1983); Ososky v. Wick, 704 F.2d 1264 (D.C. Cir. 1983).

151. 29 U.S.C. § 206(d)(1) (1976). The EPA provides in relevant part:

> No employer having employees subject to (the minimum wage provisions of the FLSA) shall discriminate, within any establishment . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in

may escape liability by either refuting part of the prima facie case or by pleading and proving one of the EPA's four affirmative defenses as mentioned above.

The employer in *Bence v. Detroit Health Corp.*[152] attempted to prove that its pay differential was protected by the third and fourth exceptions to the EPA. The health club paid its female employees, who sold memberships to female customers, lower commissions than male employees selling memberships to male customers. The employer noted that there were more female customers at the health club, and, therefore, paying lower commissions to female employees had the effect of equalizing the total remuneration between female and male employees. The employer argued that its pay differential was based on a "system which measures earnings by quantity or quality of production."

The Sixth Circuit found that the employer's pay differential violated the EPA.[153] The pay differential was not protected by the third exception to the Act, the court reasoned, because neither the quantity nor the quality of the female employees' production differed from that of the male employees. The court noted that female employees had to sell more memberships to be paid the same as males, and that it was not easier to sell memberships to women than to men.[154]

Also rejected by the court was the argument that the pay differential was based on the EPA's fourth exception. The employer maintained that the difference in size of the markets for male and female health club members was a "factor other than sex." The court disagreed, noting that "any factor other than sex" does not literally mean any other factor, but rather factors traditionally used in job evaluation systems.[155]

Bennett Amendment

Title VII was enacted by Congress a year after passage of the EPA. To resolve any potential conflicts between Title VII

---

such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . .

152. 712 F.2d 1024 (6th Cir. 1983).

153. *Id.*

154. *Id.* at 1026-27.

155. *Id.* at 1029.

and the EPA, Congress passed the Bennett Amendment to Title VII.[156] The Bennett Amendment provides that any wage differential authorized by the EPA shall not constitute a violation of Title VII.[157] Plaintiffs unable to meet the Equal Pay Act's requirement of "substantially equal" work have argued that Title VII prohibits wage discrimination between employees performing dissimilar jobs of "comparable worth" or value to the employer. For many years, courts rejected "comparable worth" claims on the basis that the Bennett Amendment restricts Title VII's scope to "equal work" claims.

The proper interpretation of the Bennett Amendment was determined by the Supreme Court in *County of Washington v. Gunther.*[158] In *Gunther,* a closely divided Court (5-4) held that the Bennett Amendment does not limit Title VII wage discrimination claims to situations involving "equal work."[159] The Bennett Amendment merely incorporates into Title VII the four affirmative defenses contained in the EPA.[160] After examining the broad remedial policies behind Title VII and the EPA, the Court stated it was imperative that Title VII not be interpreted in such a way as to deprive discrimination victims of a remedy without a clear congressional mandate.[161]

The plaintiffs in *Gunther,* employed as guards in the female section of a county jail, were paid 70% of what the male guards received, despite their employer's estimate that the position of female guard was worth 95% of the male guard position. The plaintiffs claimed that part of this differential was due to intentional sex discrimination. The Supreme Court found that the employer's wage differential violated Title VII. For intentional wage disrimination, the Court reasoned, jobs need not be "substantially equal" to be compared for the purposes of determining

---

156. 42 U.S.C. § 2000e-2(h) (1976).

157. The Bennett Amendment to Title VII provides:

> [I]t shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

42 U.S.C. § 2000e-2(h).

158. 425 U.S. 161 (1981).

159. *Id.*

160. *Id.* at 168.

161. *Id.* at 178.

liability under Title VII.[162] As a result of the *Gunther* decision, plaintiffs can establish a prima facie case of sex-based wage discrimination without showing "substantial equality" of jobs.

The *Gunther* decision, while creating a new category of wage discrimination suits, has been criticized. The Court addressed solely the issue of whether the Bennett Amendment, in a case of deliberate discrimination, precludes a claim of discriminatory undercompensation under Title VII.[163] The Court failed, however, to provide guidance as to how these intentional wage discrimination claims can be proved. Moreover, Justice Brennan, writing for the majority, expressly declined to address the "controversial concept of 'comparable worth.' "[164]

Comparable Worth

There are several interpretations of the comparable worth doctrine. Under the "pure" comparable worth doctrine, discrimination exists when female employees in one job category are paid less than male employees in a totally different job category (e.g., nurses v. tree-trimmers) when the two groups are performing work which is not the same, but which is of comparable worth to their employer.[165] Discrimination exists under the "common" comparable worth doctrine when female employees in one job category are paid less than male employees in the same general job category (e.g., prison "matron" v. prison guard) when the two groups are performing work different in content but of comparable worth to the employer in terms of job requirements.[166]

The comparable worth doctrine addresses employment discrimination which results from classifying women into lower-wage job categories. This doctrine challenges the underevaluation of women's work, which is a product both of conscious dis-

---

162. *Id.* at 179.

163. *Id.* at 166.

164. *Id.* The concept of "comparable worth" has been the subject of much scholarly debate. *See, e.g.*, E. LIVERNASH, COMPARABLE WORTH: ISSUES AND ALTERNATIVES (1980); Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J.L. REF. 231 (1980); Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397 (1979).

165. BUREAU OF NATIONAL AFFAIRS, THE COMPARABLE WORTH ISSUE 1 (1981).

166. *Id.*

crimination and unconscious social perceptions.[167] Despite the enactment of Title VII and the EPA two decades ago, statistics show that women still earn only fifty-nine cents for every dollar earned by men.[168] It is clear that without consideration of comparable worth claims, Title VII does not effectively combat sex discrimination.

One commentator has noted that *Gunther* merely gives the appearance of moving toward an acceptance of the comparable worth theory.[169] Because Title VII does not provide an explicit means of proving sex discrimination for jobs of comparable worth, removing the equal work standard in Title VII suits is analogous to taking down a fence so the plaintiff may run into a brick wall.[170] According to Eleanore Holmes Norton, the former chair of the EEOC, comparable worth is the "most difficult issue ever" to fall under Title VII.[171] The EEOC does not plan to issue formal guidelines on comparable worth in the near future, but has instructed its compliance offices on how to handle comparable worth cases.[172] There are already several post-*Gunther* decisions addressing comparable worth issues.

A post-*Gunther* case which illustrates the difficulty in proving comparable worth is *Blowers v. Lawyers' Cooperative Publishing Co.*[173] The court in *Blowers* denied a motion to amend its earlier holding, in light of the Supreme Court's ruling in *Gunther*. In its previous decision, the court had refused to hold the employer, Lawyers' Cooperative Publishing Company, Inc., in violation of Title VII for paying female employees lower wages for work allegedly comparable in value to that of higher paid male employees. The court concluded that the employees failed to prove that the pay differentials were the result of intentional sex discrimination.[174] The court also held that the plaintiffs did not adequately support their case on the broader claim of com-

---

167. Gasaway, *Comparable Worth: A Post-Gunther Overview* 69 GEO. L.J. 1123, 1130 (1981).

168. *Id.*

169. Comment, *County of Washington v. Gunther: Movement Towards Comparable Worth*, 17 TULSA L.J. 327 (1981).

170. *Id.* at 345.

171. BUREAU OF NATIONAL AFFAIRS, THE COMPARABLE WORTH ISSUE 3 (1981).

172. *Id.*

173. 27 Fair Empl. Prac. Cas. (BNA) 1222 (W.D. N.Y. 1981).

174. *Id.* at 1223.

parable worth, which the Supreme Court in *Gunther* expressly declined to sanction.[175]

Plemer v. Parsons-Gilbane[176] is another post-*Gunther* case in which the plaintiff was unable to prove intentional wage discrimination. In *Plemer,* a female employee brought a Title VII and EPA suit against her employer using statistics to show that females occupied the lowest position on the employer's pay scale. Noting that the case was not a "classic" equal pay claim, the Fifth Circuit held that the plaintiff failed to prove intentional underpayment on the basis of sex.[177] The court refused to make what it considered an "essentially subjective assessment" of the value of the various duties and responsibilities of the positions to determine whether the plaintiff was paid less because she was female.[178]

It is uncertain whether courts will allow comparable worth lawsuits based on the disparate impact model. Under the disparate impact model, Title VII would provide a cause of action where employees performing work of comparable worth to their employer are compensated unequally, regardless of whether the employer intentionally discriminated on the basis of sex. A plaintiff using the disparate impact model could demonstrate that an employer's job classification scheme disproportionately affects women without having to prove discriminatory motive. Because the disparate treatment model requires a plaintiff to cite a purposeful discriminatory act, it could be easier for a plaintiff to prove wage discrimination, based on comparable worth, by using the disparate impact theory.[179]

Commentators have suggested that use of the disparate impact doctrine for comparable worth claims furthers the social policy of alleviating present harm due to past individual or societal discrimination. Professor Blumrosen has proposed that the discriminatory factors which lead to job segregation are also responsible for wage differentials between segregated jobs, and that an adverse impact of job segregation is a depressed wage

175. *Id.*
176. 713 F.2d 1127 (5th Cir. 1983).
177. *Id.* at 1131.
178. *Id.* at 1134.
179. EMPLOYMENT DISCRIMINATION LAW, *supra* note 30, at 477.

rate for minority and female employees.[180] To establish a prima facie case of wage discrimination under Blumrosen's theory, a plaintiff must show job segregation—that the jobs were identified as either minority or female jobs— and that the wages in the segregated jobs were at the low end of the employer's pay scale.[181]

Use of the disparate impact doctrine for comparable worth claims has been criticized, however. It has been suggested that comparable worth claims intrude further into employer prerogatives and labor-managements relations than Congress intended.[182] An employer's wage policy may reflect goals only tangentially related to a dollar measure of job content, such as providing incentives for workers to perform well, reducing turnover in key positions, and minimizing training costs.[183] It has also been suggested that requiring employers to set wages according to "job-related" factors alone conflicts with Congress's efforts to ensure that Title VII does not infringe on an employer's rights to run a business in the manner which the employer believes is most efficient.[184] Critics of Blumrosen's thesis also maintain that Title VII was not intended to address wage discrimination resulting from job segregation.[185]

D. Fringe Benefits

Section 703(a)(1) of Title VII, which makes it an unlawful employment practice for an employer "to discriminate against any individual with respect to its . . . terms, conditions, or privileges of employment," prohibits disparate treatment of women and men with regard to fringe benefits.

The Supreme Court, in *Los Angeles Department of Water & Power v. Manhart*,[186] struck down the employer's policy of requiring female employees to make larger contributions than

---

180. Blumrosen, *Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397 (1979).

181. *Id.* at 459.

182. Note, *Sex-Based Wage Discrimination Under the Title VII Disparate Impact Doctrine*, 34 STAN. L. REV. 1083, 1101 (1982).

183. *Id.* at 1101.

184. *Id.* at 1098.

185. Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J.L. REF. 233 (1980).

186. 435 U.S. 703 (1978).

male employees to its pension fund. The employer's reason for collecting greater contributions from female employees was that women as a class live longer than men. The Court rejected the argument that the requirement for greater benefits was based "on a factor other than sex"—i.e., longevity—and was therefore permissible under the Equal Pay Act.[187] An employer may not defend a Title VII charge of sex discrimination in benefits, the Court stated, on the basis that the cost of such benefits is greater for one sex than the other.[188] The Court also found that the use of sex-segregated actuarial tables to calculate retirement benefits violates Title VII, whether or not the tables reflect an accurate prediction of the longevity of women as a class, for under the statute "even a true generalization about [a] class" cannot justify class-based treatment.[189]

The relief awarded in *Manhart* was prospective only. While acknowledging that the *Albermarle*[190] presumption in favor of retroactive liability can seldom be overcome,[191] the Court concluded that special circumstances justified the denial of retroactive relief. The Court reasoned that retroactive relief based on drastic changes in the legal rules governing pension and insurance funds could jeopardize the insurer's solvency and the insured's benefits.[192] The Court also explained that because courts had been silent on the question, pension administrators may well have assumed that the pension program was lawful.[193]

Because insurance companies have historically maintained separate statistics on the sexes, operating under the premise that women live longer than men, they frequently charge women more for the same benefits men receive, or offer reduced benefits to women for the same money men pay.[194] The employer in

187. *Id.* at 713.
188. *Id.* at 717.
189. *Id.* at 708.
190. In *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Supreme Court reviewed the scope of a district court's discretion to fashion appropriate remedies for a Title VII violation and concluded that "backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.* at 421.
191. 435 U.S. at 719.
192. *Id.* at 721.
193. *Id.* at 720.
194. EMPLOYMENT DISCRIMINATION LAW, *supra* note 30, at 382.

Manhart administered the entire pension plan itself, without the participation of an insurance company. In *Arizona Governing Committee for Tax Deferred Compensation Plans v. Norris*,[195] the Supreme Court determined the liability of an employer offering employees discriminatory pension plans administered by insurance companies.

Arizona's pension plan gave state employees the option of receiving retirement benefits from one of several companies selected by the employer, all of which paid a woman lower monthly retirement benefits than a man who had made the same contributions. The Supreme Court, in a 5-4 decision, rejected the argument that the employer did not violate Title VII because private insurance companies actually calculated and paid the pension benefits.[196] Because employers are ultimately responsible for the compensation, terms, conditions, and privileges of employment provided to employees, the Court reasoned, an employer that discriminates among its employees on the basis of race, religion, sex or national origin violates Title VII regardless of whether third parties are also involved in the discrimination.[197] Also rejected by the majority was the employer's argument that sex-segregated actuarial tables accurately predict the longevity of women as a class. The Court concluded that Title VII requires employers to treat their employees as individuals, not as components of a racial, religious, sexual or national class.[198]

The trial court in Norris awarded the plaintiffs retroactive relief, enjoining the employer to assure that future annuity payments to retired female employees would be equal to the payments received by similarly situated male employees. The Supreme Court, however, refused to grant retroactive relief and held that the decision should be prospective only—for employee contributions collected before the date of the decision, employers and insurers could continue to calculate resulting benefits under existing methods.[199]

Justice O'Connor joined the majority in finding that the em-

195. 103 S. Ct. 3492 (1983).
196. *Id.* at 3497.
197. *Id.* at 3496.
198. *Id.*
199. *Id.* at 3498.

ployer's practice violated Title VII. In the relief section of the opinion, however, she voted with the four Justices who dissented in the earlier parts of the opinion. Justice O'Connor's vote was, therefore, critical in determining that the relief should not be retroactive. In awarding prospective relief, Justice O'Connor reasoned that requiring employers to disperse greater pension benefits than the collected contribution could support would jeopardize the entire pension fund.[200] She also noted that if the fund could not meet its obligations, "[t]he harm would fall in large part on innocent third parties."[201]

Justice O'Connor's reasoning, while persuasive, is faulty because it fails to recognize that the "innocent third parties" are in fact those retired females, who have received and will continue to receive, lower pension benefits than male retirees. In focusing on the plight of the employer rather than on that of the discrimination victim, the Court fails to provide the female retirees with an adequate remedy. The employer-oriented analysis used by Justice O'Connor in *Norris* is similar to her analysis of the appropriate remedy in *Ford.*[202]

Justice Marshall, writing for the majority in Parts I, II and III of the opinion, disagreed with the relief awarded in Part IV.[203] Absent special circumstances, he noted, a victim of a Title VII violation is entitled to whatever retroactive relief is necessary to undo damage resulting from the violation.[204] Because the Court's decision in *Norris* was clearly foreshadowed by *Manhart,* reasoned Justice Marshall, employers were on notice that a sex-based pension plan was unlawful.[205] Rather than making the relief prospective, Justice Marshall would require that the post-*Manhart* contributions of female employees be treated in the same way as similarly-situated males.[206]

Each of the above cases of sex discrimination in fringe benefits was brought under the disparate treatment model. Claims of discrimination in fringe benefits have also been brought under

200. *Id.* at 3492, 3512 (O'Connor, J., concurring).
201. *Id.* at 3492, 3512 (O'Connor, J., concurring) (citing *Manhart,* 435 U.S. at 722-23).
202. Ford Motor Co. v. EEOC, 458 U.S. 219 (1982).
203. 103 S. Ct. at 3492, 3502-04.
204. *Id.* at 3503 (Marshall, J., dissenting).
205. *Id.*
206. *Id.* at 3503-04 (Marshall, J. dissenting).

the disparate impact model. Facially neutral classifications resulting in different fringe benefits for women and men violate Section 703(a)(2) of Title VII, which prohibits employer classifications which "limit, segregate, or classify" employees in any way which will deprive an individual of employment opportunities.[207]

In *Wambheim v. J.C. Penney, Inc.*,[208] female employees brought a class action challenging provisions in J.C. Penney's insurance policy. The "head-of-household" provision in J.C. Penney's medical and dental policies permitted insurance coverage for an employee's spouse only if the employee earned more than the spouse. Statistics presented by the female employees indicated that 12.5% of the married female employees qualified as heads of households while 89.34% of the males qualified.[209] The statistics also indicated that most of the women at Penney's worked in low-paying sales positions.[210]

The Ninth Circuit held that the plaintiffs proved a prima facie case of discrimination under the disparate impact theory.[211] The court found, however, that the employer had established a business necessity for its head-of-household provision.[212] The court noted that the rule established by the Supreme Court in *Manhart*, that cost differential of providing benefits to male and female employees is not a legitimate justification for intentional discrimination, was not controlling.[213] While cost differential is not a legitimate nondiscriminatory reason for intentional discrimination in providing fringe benefits under the disparate treatment model, the court concluded that it is a legitimate business necessity under the disparate impact model.[214]

---

207. 42 U.S.C. § 2000e-2(a)(2) (1976).

208. 705 F.2d 1492 (9th Cir. 1983).

209. *Id.* at 1494.

210. *Id.* at 1493.

211. *Id.* at 1495.

212. *Id.*

213. *Id.*

214. *Id.*

Pregnancy Discrimination Act

In 1978, Congress enacted the Pregnancy Discrimination Act (PDA)[215] as Section 701(k) of Title VII.[216] The PDA was passed by Congress to overrule the Supreme Court's decision in *General Electric Co. v. Gilbert.*[217] In *Gilbert,* the Court held that an employer's disability plan, which excluded periods of disability arising from or related to pregnancy or any unrelated disability occurring while on a pregnancy/childbirth leave, did not violate Title VII.[218]

The sponsors and supporters of the PDA were dissatisfied with the *Gilbert* decision because they feared it would weaken the position of women in the work force and jeopardize the financial security of working women and the families they support.[219] The PDA prohibits employer medical and disability plans which exclude pregnancy coverage.

Since 1972, the EEOC has maintained that employment policies or practices which discriminate against female employees affected by pregnancy, childbirth and related medical conditions constitute disparate treatment based on sex.[220] The EEOC has taken the view that an employer may not deny its unmarried employees pregnancy benefits.[221] Another position maintained by the EEOC is that if pregnancy coverage is given to female employees, it must also be extended to the spouses of male

---

215. 42 U.S.C. § 2000e(k) (Supp. V 1981).

216. The Pregnancy Discrimination Act provides in relevant part that

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions, and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title [42 U.S.C. § 2000e-2(h)] shall be interpreted to permit otherwise . . . .

42 U.S.C. § 2000e(k) (Supp. V 1981).

217. 429 U.S. 125 (1976). "The Supreme Court's narrow interpretation of Title VII tends to erode our national policy of nondiscrimination in employment." H.R. REP. No. 95-948, 95th Cong., 2d Sess. 6 *reprinted in* (1978) U.S. CODE CONG. & AD. NEWS 4751. *See also* S. REP. No. 331, 95th Cong., 1st Sess. 3 (1977).

218. 429 U.S. at 129.

219. EEOC v. Joslyn Mfg. & Supply Co., 706 F.2d 1469, 1472 (7th Cir. 1983).

220. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.9(d) (1983).

221. EEOC Questions and Answers on § 701(k), 29 C.F.R. § 1604 (1983).

employees.[222]

Until recently, the circuits were split on the issue of whether an employer's health insurance plan, which provides female employees with hospitalization benefits for pregnancy-related conditions but offers less extensive pregnancy benefits for spouses of male employees, violated the PDA.[223] The Supreme Court resolved this conflict in its decision in *Newport News Shipbuilding and Dry Dock Co. v. EEOC*.[224]

The employer in *Newport* amended its health insurance plan after the enactment of the PDA. This revised plan provided female employees with hospitalization benefits for pregnancy-related conditions to the same extent as for other medical conditions, but provided less extensive pregnancy benefits for spouses of male employees. The employer challenged the EEOC's guidelines which indicated the amended plan was unlawful. The EEOC then filed an action against the employer, alleging that the employer's provision of hospitalization benefits discriminated against male employees.

The Supreme Court held that the limitation in the employer's amended health plan discriminated against male employees in violation of Section 703(a)(1).[225] The employer's plan, the Court reasoned, unlawfully gave married male employees a less inclusive benefit package for their dependents than the dependency coverage provided to married female employees.[226] The Court concluded that the PDA proscribed distinctions in medical coverage based on the pregnancy of either female employees or female spouses.[227]

III. Discrimination in Education

Title IX of the Education Amendments of 1972[228] was enacted to promote equal treatment of women and men in educa-

222. 29 C.F.R. § 1604.9(d) (1979).

223. *Compare* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 682 F.2d 113 (4th Cir. 1982) (en banc), *aff'd*, 103 S. Ct. 2622 (1983) (accepts EEOC view) *with* EEOC v. Lockheed Missiles & Space Co., 680 F.2d 1243 (9th Cir. 1982) *and* EEOC v. Joslyn Mfg. & Supply Co., 706 F.2d 1469 (7th Cir. 1983) (rejects EEOC position).

224. 103 S. Ct. 2622 (1983).

225. *Id.*

226. *Id.* at 2631.

227. *Id.*

228. 20 U.S.C. §§ 1681-1686 (1982).

tion. The Act prohibits sex discrimination in education programs and activities receiving federal financial assistance. There are two core provisions contained in Title IX.[229] Section 901(a) of the Act contains a program-specific ban on sex discrimination:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .[230]

Under section 902, agencies awarding federal financial assistance to education programs or activities are authorized to promulgate regulations to ensure compliance with section 901(a).[231] Section 902 authorizes the termination of federal funds to the program in which compliance is found, if compliance cannot be secured by voluntary means. The Department of Education is the primary administrator of federal financial assistance to education.[232]

Title IX does not expressly authorize a private right of action by a person injured by a discriminatory educational program. In *Cannon v. University of Chicago*,[233] however, the Supreme Court held that a woman who is discriminated against on the basis of sex by a federally funded educational program may maintain a private cause of action.[234] The plaintiff in *Cannon*

---

229. These sections of Title IX were derived from the virtually identical language of Title VI of The Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), which prohibits race discrimination in federally assisted programs.

230. 20 U.S.C. § 1681(a) (1982).

231. 20 U.S.C. § 1682 (1982). Section 902 provides in relevant part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 901(a) of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute. . . .

232. The Department of Health, Education and Welfare's responsibilities for educational institutions under Title IX were transferred to the Department of Education by § 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668, 678 (1979). The Department of Health, Education and Welfare was then reorganized as the Department of Health and Human Services.

233. 441 U.S. 677 (1979).

234. *Id.*

alleged that she had been denied admission to a medical school receiving federal financial assistance, on the basis of her gender. The Supreme Court concluded that Title IX impliedly provides for private actions to vindicate the rights granted individuals by the statute.[235]

The question of whether a plaintiff is entitled to a damages remedy under Title IX was not addressed by the Supreme Court in *Cannon*. In *Lieberman v. University of Chicago*,[236] decided after *Cannon*, the Seventh Circuit refused to imply a damages remedy under Title IX.[237] The plaintiff in *Lieberman* alleged she was denied admission to Pritzker School of Medicine at the University of Chicago because of sex discrimination. After being denied admission to Pritzker, the plaintiff decided to attend Harvard Medical School, where she had been accepted, and moved from the Chicago area. The plaintiff then sought declaratory and injunctive relief as well as compensatory and punitive damages.

Noting the availability of other remedies, including attorney's fees, injunctive relief and federal administrative action, the Seventh Circuit held that a damages remedy was not consistent with the legislative purposes of Title IX.[238] Because Congress did not explicitly provide for a damages remedy, the court concluded that the statute precluded such a remedy.[239]

The dissent in *Lieberman* viewed the majority's decision as a "setback in Congress' attempt to ban sex discrimination."[240] Precluding a damages remedy, argued the dissent, will cripple enforcement of the statute, and, in some cases, deprive a wronged individual of a remedy.[241]

The Seventh Circuit's conclusion that a damages remedy cannot be judicially implied under Title IX has also been criticized by some commentators. Noting that the Seventh Circuit's approach to interpreting Title IX is "restrictive," one commentator has argued that a damages remedy could be an effective

235. *Id.* at 717.
236. 660 F.2d 1185 (7th Cir. 1981), *cert. denied*, 456 U.S. 937 (1982).
237. *Id.* at 236.
238. *Id.* at 1188.
239. *Id.*
240. *Id.* at 1194-95 (Swygert, S. J., dissenting).
241. *Id.*

means for accomplishing the nondiscrimination objectives of Title IX.[242] Allowing such a remedy would enable courts to compensate individuals wronged by Title IX violations, effectuate the statute's purposes, and deter future violations.[243]

As a condition for its students receiving federal financial assistance, educational institutions are required to file assurance of compliance forms, indicating that the institution does not discriminate on the basis of sex. Courts have held that educational institutions which receive no direct federal aid, but whose students receive loans or grants, are recipients of federal financial assistance within the meaning of Title IX. The Third and Sixth Circuits have disagreed, however, on whether the Department of Education has authority to terminate students' financial assistance, based on an institution's failure to file an assurance of compliance form in accordance with the regulations.

In *Grove City College v. Bell*,[244] the Third Circuit found that the Department of Education was within its authority in terminating federal financial assistance to students for the institution's failure to file an assurance of compliance form.[245] Grove City College, a private coeducational institution receiving no federal or state financial assistance other than aid to its students, refused to file the compliance form, asserting that it received no federal financial assistance. Noting that the language of section 901(c) extends Title IX's coverage to "any education program or activity receiving federal financial assistance," the court held that the statute encompasses all forms of federal aid to education, direct or indirect.[246]

In determining that Grove was a recipient of federal financial assistance within the meaning of Title IX, the court also examined the legislative history of the Act. Observing that Title IX is a counterpart of Title VI, the court reasoned that the former should be similarly interpreted.[247] The court then relied on the analysis used in *Bob Jones University v. Johnson*,[248] a

242. Note, *Lieberman v. University of Chicago: Refusal to Imply a Damages Remedy Under Title IX of the Education Amendments of 1972*, 1983 WIS. L. REV. 181.
243. *Id.* at 210.
244. 687 F.2d 684 (3d Cir. 1982).
245. *Id.*
246. *Id.* at 691.
247. *Id.* at 687.
248. 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1976).

Title VI decision which held that indirect federal financial assistance brought a university within Title VI's coverage. The court concluded that the language of Title IX, its legislative history, post-enactment events, and the *Bob Jones* decision supported a finding that Grove was a recipient of federal financial assistance.[249]

Grove also argued that Title IX limits the Department's authority to terminate federal funding to "the particular program" which does not comply with the regulatory requirements. Because of Title IX's program specific language, Grove maintained, only those activities or programs for which federal funds are specially earmarked are subject to funding termination. The court held that Grove was incorrect in claiming that the program specific provisions of the statute preclude Title IX coverage when indicrect aid is involved.[250] Where the federal government furnishes indirect or non-earmarked aid to an institution, the court concluded, the "program" must be defined as the entire institution.[251]

In contrast to the *Grove* decision, the Sixth Circuit, in *Hillsdale College v. Department of Health, Education and Welfare,*[252] held that terminating all student federal financial assistance to an institution which is found to discriminate in a particular program is inconsistent with the program-specific language of Title IX.[253] The court found, as in *Grove,* that Hillsdale College was a recipient of the aid to its students.[254] Contrary to *Grove,* however, the court reasoned that the entire college was not a "program" within the meaning of Title IX, and concluded that only the student loan and grant program was subject to Title IX regulation.[255] Because the assurance of compliance forms Hillsdale was required to file covered the entire college, and were not limited to its student loan and grant program, the court held that the regulation requiring execution of the form as a condition for receiving student loans and grants was invalid.[256]

---

249. 687 F.2d at 696.
250. *Id.* at 701.
251. *Id.* at 700.
252. 696 F.2d 418 (6th Cir. 1982).
253. *Id.*
254. *Id.* at 430.
255. *Id.*
256. *Id.*

The Third Circuit relied on its decision in *Grove* in determining whether a university's discriminatory intercollegiate athletic program was subject to Title IX, where no federal funds had been earmarked for athletics. In *Haffer v. Temple University*,[257] university undergraduates brought a class action alleging that Temple University discriminated on the basis of sex in its intercollegiate athletic program. Conceding that it received substantial federal financial assistance, Temple argued that its intercollegiate athletic program was exempt from the requirements of Title IX because the university received no federal funds earmarked for intercollegiate athletics. The court noted that *Grove* rejected the assertion that the program-specific nature of Title IX limits the authority of the Department of Education to regulate only in those situations in which the federal monies to a specific program be pinpointed.[258] The court then concluded that Temple University as a whole was the "program" for Title IX purposes, and that its intercollegiate athletic program was therefore governed by Title IX.[259]

In a broad interpretation of Title IX, the Supreme Court, in *North Haven Board of Education v. Bell*,[260] held that employment discrimination comes within the Act's prohibition. In 1975, HEW invoked its authority to issue regulations governing the operation of federally funded education programs. Interpreting the term "person" in Title IX to encompass employees as well as students, HEW promulgated a series of regulations which dealt with employment. In *North Haven*, two public school boards brought separate suits challenging HEW's authority to issue these regulations and claimed that Title IX was not meant to reach the employment practices of educational institutions.

Prior to the suits, HEW investigated complaints about the two public school systems, both of which were receiving federal financial support. A complaint against the North Haven School System was filed by a female tenured teacher whom North Haven had refused to rehire after she returned from a one-year maternity leave. Trumbull Board of Education, the other school system under HEW investigation, had allegedly discriminated

257. 688 F.2d 14 (3d Cir. 1982).
258. *Id.* at 16.
259. *Id.* at 17.
260. 456 U.S. 512 (1982).

against a female guidance counselor with respect to job assignments, working conditions, and failure to renew her contract. The Supreme Court concluded that the regulations promulgated by HEW pursuant to Title IX were valid. The legislative history of Title IX, the Court reasoned, demonstrated that employment discrimination was intended to come within the statute's prohibition.[261]

IV. Discrimination in Credit

The Equal Credit Opportunity Act (ECOA),[262] enacted as Subchapter IV of the Consumer Credit Protection Act,[263] prohibits discrimination by creditors "against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction."[264]

Congress empowered the Federal Reserve Board to promulgate regulations which effectuate the purposes of the ECOA.[265] Administrative enforcement responsibilities are assigned to several agencies, depending on the creditor involved, and the Federal Trade Commission (FTC) is charged with overall enforcement authority.[266]

A creditor who violates the Act is civilly liable to the aggrieved applicant for actual damages sustained.[267] Actual damages can include injury to credit reputation, mental anguish, humiliation, embarrassment, inconvenience as well as loss of purchasing power and out-of-pocket monetary expenses.[268] An applicant may bring a claim against a creditor either individually or as a representative of a class. Injunctive relief and punitive damages are also available under the Act.[269]

---

261. *Id.*

262. 15 U.S.C. § 1691 (1982).

263. 15 U.S.C. §§ 1691-1691(f) (1982).

264. "It shall be unlawful for any creditor to discriminate against any applicant with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex or marital status, or age. . . ." 15 U.S.C. § 1691(a) (1982).

265. 12 C.F.R. § 202.1 (1983).

266. 15 U.S.C. § 1691c(a)-(d) (1982).

267. 15 U.S.C. § 1691e(a) (1982).

268. Owens v. Magee Finance Service, Inc., 476 F. Supp. 758, 770 (E.D. La. 1979); Shuman v. Standard Oil Co., 453 F. Supp. 1150, 1154 (N.D. Cal. 1978). *But see* Cherry v. Amoco Oil Co., 490 F. Supp. 1026, 1029 (N.D. Ga. 1980).

269. 15 U.S.C. § 1691e(a)-(c) (1982).

The purpose of the ECOA is to eradicate credit discrimination against women, particularly married women whom creditors have traditionally refused to consider for individual credit. The ECOA, as originally enacted in 1974,[270] established some protection against sex-based discrimination, but failed to treat all of the important areas of potential discrimination in credit extension.[271] The need for further antidiscrimination credit protection resulted in the ECOA Amendments in 1976[272] and an additional implementing regulation, Regulation B.[273]

The ECOA Amendments significantly extend the scope of the original Act. Prohibited criteria in the credit-granting process now include age, race, color, national origin, religion, and receipt of public assistance benefits.[274] The Amendments authorize the FTC to enforce the promulgations of the Federal Reserve Board,[275] and make the U.S. Attorney General a potential ECOA enforcer.[276] If the agencies responsible for administrative enforcement are unable to obtain compliance by their own actions, they may refer the matter to the Attorney General.[277] The Attorney General may also initiate a civil action on his own, if he has reason to believe that one or more creditors are violating the Act.[278]

The ECOA Amendments and Regulation B expressly require creditors to provide written notice[279] of the specific reason for any adverse action[280] taken against a consumer.[281] This requirement not only provides an applicant with the assurance

---

270. The Equal Credit Opportunity Act (ECOA), Pub. L. No. 93-495, 88 Stat. 1521 (1974), *as amended by* Pub. L. No. 94-239, 90 Stat. 251-55 (1975) (codified at 15 U.S.C. §§ 1691-1691(f) (1982)) was passed in 1974 and became effective in October, 1975.

271. Blakely, *Credit Opportunity for Women: The ECOA and its Effects*, 1981 WIS. L. REV. 655, 662.

272. Pub. L. No. 94-239, 90 Stat. 251-55 (1975) (codified at 15 U.S.C. §§ 1691-1691(f) (1982)).

273. 12 C.F.R. § 202 (1983).

274. 15 U.S.C. § 1691(a)(1) (1982).

275. *Id.*

276. *Id.* at § 1691e(h).

277. *Id.* at § 1691e(g).

278. *Id.* at § 1691e(h).

279. *Id.* at § 1691(d)(1)-(3).

280. The term "adverse action" is defined in § 1691(d)(6) as "a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested."

281. 15 U.S.C. § 1691(d)(1)-(3); *see also* 12 C.F.R. § 202.9 (1983).

that the credit rejection was legitimate, but also enables the applicant to attempt to improve her or his credit rating upon learning the reason for the denial of credit.[282] The notice requirement is particularly beneficial to female consumers who have experienced difficulty as a group in securing credit.

The Fifth Circuit, in *Fischl v. General Motors Acceptance Corporation*,[283] held that the defendant failed to furnish a specific reason for denying credit to the plaintiff.[284] The defendant, General Motors Acceptance Corporation (GMAC), obtained a consumer report containing erroneous credit information about the plaintiff from a local credit reporting service. GMAC then informed the plaintiff that his credit application had been rejected because of "insufficient credit references." The court found that GMAC's explanation of refusing credit to the plaintiff did not satisfy the ECOA's objectives of educating and protecting the consumer.[285] Because the written notice failed to indicate either concrete criteria for the denial of credit or the name and address of the credit bureau used by GMAC, the court concluded that the plaintiff was denied an opportunity to correct the inaccurate information.[286]

The ECOA regulations specify what information may be requested in a credit application. In general, "a creditor may request any information in connection with an application."[287] A creditor may not, however, request information concerning the birth control practices and child-bearing intentions or capability of a female credit applicant.[288] If a woman applies for individual

---

282. As explained in the Senate Report accompanying the 1976 amendments to the ECOA, Congress viewed the strict notice requirement as:

> a strong and necessary adjunct to the antidiscrimination purpose of the legislation, for only if creditors know they must explain their decisions will they effectively be discouraged from discriminatory practices. Yet this requirement fulfills a broader need: rejected credit applicants will now be able to learn where and how their credit status is deficient and this information should have a pervasive and valuable educational benefit. . . .

S. REP. No. 94-589, 94th Cong., 2d. Sess., *reprinted in* (1976) U.S. CODE CONG. & AD. NEWS 403, 406.

283. 708 F.2d 143 (5th Cir. 1983).

284. *Id.* at 147.

285. *Id.* at 146-48.

286. *Id.*

287. 12 C.F.R. § 202.5(b)(1) (1983).

288. *Id.* at § 202.5(d)(4).

unsecured credit, a creditor may not inquire into her marital status.[289] A creditor is also prohibited from requesting any information about a woman's ex-husband, unless the woman is relying on alimony or child support as a source of funds to repay a loan. When a woman applies for her own credit and relies on her own income, information about her spouse or his co-signature can be required only under certain circumstances.[290]

In *Anderson v. United Finance Company*,[291] the Ninth Circuit held that a lender's request for a spouse's signature on a note, where a female applicant has applied for and been granted a loan individually, violates the ECOA.[292] The plaintiff in *Anderson* requested the defendant to place the loan for which she applied in her name because she was attempting to establish individual credit. The defendant made out the loan to both the plaintiff and her spouse, and issued the check solely in the name of the plaintiff's spouse. The lower court held that such a "technical violation" did not result in discrimination under the ECOA. The Ninth Circuit reversed, stating that the violation was "just the type of discrimination which the Act was created to prohibit."[293]

A lender may insist on the signature of the credit applicant and her spouse if state law requires both signatures to create a valid lien. In *McKenzie v. U.S. Home Corp.*,[294] the plaintiff applied through the defendant's mortgage corporation for a loan to purchase a home. At that time, McKenzie was separated from her husband and divorce proceedings were pending. The mortgage corporation instructed McKenzie that the loan could not be made unless the divorce became final or McKenzie's husband signed the deed of trust. The plaintiff brought suit, alleging that she was denied credit because of her marital status. The defendant relied on 15 U.S.C. 1691d(a) which provides: "A request for the signature of both parties to a marriage for the purpose of creating a valid lien . . . shall not constitute discrimination . . . ." The Fifth Circuit held that the defendant's requirement

289. *Id.* at § 202.5(d)(1).
290. *Id.* at § 202.5(d)(2).
291. 666 F.2d 1274 (9th Cir. 1982).
292. *Id.* at 1276.
293. *Id.*
294. 704 F.2d 778 (5th Cir. 1983).

that the plaintiff's husband sign the deed was not impermissible discrimination on the basis of marital status.[295]

The ECOA prohibits not only overt discrimination by creditors, but also facially neutral practices which are discriminatory in effect.[296] The legislative history of the ECOA indicates that the disparate impact model applies to credit discrimination.[297] In addition, Regulation B cites the Congressional intent to analyze credit discrimination claims under the disparate impact model.[298]

The ECOA regulations prohibit creditor practices which have a discriminatory impact. For example, the regulations prohibit a creditor from excluding part-time income in assessing an applicant's creditworthiness. Discounting part-time income, though neutral on its face, has the effect of discriminating against women.[299] The Supreme Court has not yet addressed the issue of whether the disparate impact model is appropriate for cases brought under the ECOA. One commentator has argued that the legislative history of the Act and the accompanying regulations indicate that courts should apply the disparate impact test in the ECOA area.[300]

The Ninth Circuit, in *Miller v. American Express Co.*,[301] held that, in some instances, a plaintiff may prove an ECOA violation without showing discriminatory intent or disparate impact.[302] Miller brought an action against American Express (AMEX) when her account was automatically cancelled after her husband's death. Miller's account, while supplementary to her

---

295. *Id.* at 779.

296. Section 701(a) of the ECOA provides that "[i]t shall be unlawful for any credit transaction to discriminate against any applicant with respect to any aspect of a credit transaction on the basis of race . . . sex or marital status. . . ." 15 U.S.C. § 1691(a) (1982).

297. S. REP. No. 589, 94th Cong., 2d Sess. 4, *reprinted in* (1976) U.S. CODE CONG. & AD. NEWS 403, 406 ("[i]n determining the existence of discrimination . . . courts or agencies are free to look at the effects of a creditor's practices as well as the creditor's motives or conduct in individual transactions. . . ."); H.R. REP. No. 210, 94th Cong., 1st Sess. 5 (1975) (statutory provisions not intended to limit use of population statistics to establish prima facie case of discrimination "in accordance with the 'effects' test. . . .").

298. 12 C.F.R. § 202.6 n.7 (1983).

299. 12 C.F.R. § 202.6(b)(5) (1983).

300. Blakely, *Credit Opportunity For Women: The ECOA and its Effects*, 1981 WIS. L. REV. 655, 672-73.

301. 688 F.2d 1235 (9th Cir. 1982).

302. *Id.* at 1239-40.

husband's basic account, was a separate account for which she was contractually liable. She claimed AMEX had violated the ECOA in terminating her account after her marital status changed from married to widowed.

AMEX argued that Miller failed to show that AMEX's practice of cancelling the accounts of supplementary cardholders on the death of the basic cardholder was adopted with discriminatory intent or had an adverse impact on widows as a class. The cancellation policy was not discriminatory, AMEX maintained, because it applied to all supplementary cardholders, including widows, widowers, siblings and children of the basic cardholder.

The court concluded that AMEX's policy violated the ECOA's provision which prohibited creditors from discriminating with respect to any credit transaction on the basis of marital status.[303] The court relied on 12 C.F.R. § 202.7(c)(1) which provides that a creditor must not terminate the account of a person who is contractually liable on an existing account on the basis of change in marital status, in the absence of evidence of inability or unwillingness to repay. This regulation, reasoned the court, is addressed directly to one of the evils that the ECOA was designed to prevent—loss of credit because of widowhood.[304] The court concluded that AMEX's conduct was within that prohibited by the regulation and that proof of credit discrimination is not limited to the two traditional Title VII tests for employment discrimination.[305]

V. Conclusion

Title VII, Title IX, and the ECOA are potentially effective instruments for combating sex discrimination in employment, education, and credit. Recent case law indicates that courts have taken both restrictive and expansive approaches to this legislation. Effectuating the remedial purpose of Title VII, Title IX, and the ECOA will depend on consistent judicial willingness to interpret these statutes broadly.

A major obstacle for Title VII claimants has been proving

303. *Id.* at 1240.
304. *Id.* at 1238.
305. *Id.* at 1240.

discrimination under the disparate treatment model. Because courts are lenient in what they accept as a legitimate non-discriminatory reason for an employer's actions, an employer can usually carry its burden of production. A plaintiff proving disparate treatment will, therefore, usually have to establish that the employer's articulated reason is pretextual. Even if a plaintiff is able to establish disparate treatment, she still faces the possibility of receiving an inadequate remedy. The unjust remedies granted in *Ford* and *Norris* reflect the Supreme Court's concern for protecting employers and the Court's relative indifference to a discrimination victim's need to be made "whole."

Case law in the area of sexual harassment, one form of disparate treatment, is still developing. Whether the employer in sexual harassment cases carries a burden of persuasion, as indicated in *Bundy,* needs to be clarified. The EEOC Guidelines on sexual harassment, which are more expansive than existing case law, have not yet been widely interpreted. Employer liability for the discriminatory acts of supervisors has been established, but there is almost no case law on co-worker harassment. It is likely that the issue of sexual harassment will eventually reach the Supreme Court—perhaps on a direct challenge to the EEOC Guidelines.

Proving disparate impact may be easier for Title VII claimants, in some instances, because this model does not require proof of the employer's discriminatory intent. The Supreme Court has not yet resolved the critical question, on which the circuits have conflicted, of whether an employer carries a burden of persuasion or production in a disparate impact claim. The Fifth Circuit's decisions in *Pouncy* and *Carpenter* limit the use of the disparate impact model to situations in which there is a causal connection between a specific employment practice and the disparate impact. *Pouncy* and *Carpenter* also require use of the disparate treatment model if the challenged employment practice is the result of the employer's subjective discretionary choices rather than facially neutral employer policy. Whether the Supreme Court will similarly restrict the use of the disparate impact model remains to be seen. The Ninth Circuit, in *Wambheim,* indicated that cost differential, while not a legitimate reason for disparate treatment, can be a legitimate business necessity under the disparate impact model. It is unclear

whether the other circuits and the Supreme Court will view cost differential as a legitimate business necessity in disparate impact cases.

Courts will probably address comparable worth issues in more detail, now that the Supreme Court has determined the proper interpretation of the Bennett Amendment. So far, post-*Gunther* decisions demonstrate judicial reluctance to endorse the comparable worth concept. Courts are particularly unwilling to make what they consider subjective assessments of job "worth." Whether judicial resolution will be favorable to the comparable worth doctrine is still uncertain. If the resolution is unfavorable, Congress could amend Title VII to endorse the concept. Without the use of the comparable worth doctrine, wage discrimination cannot be adequately addressed. Significant opposition exists to using the disparate impact model for comparable worth claims. It remains to be seen whether comparable worth, if accepted, will be restricted to disparate treatment claims, in which the plaintiff has the burden of proving intentional wage discrimination.

There has been very little case law on Title IX. The Supreme Court has interpreted Title IX as providing a private cause of action. The Seventh Circuit, however, subsequently refused to imply a damages remedy for the statute. The Supreme Court has held that sex discrimination in employment comes within Title IX's prohibition. An issue not yet resolved by the Supreme Court is whether the program-specific language of the statute limits funding termination to only those discriminatory programs for which federal funds have been earmarked.

As with Title IX, not much case law exists interpreting the ECOA. To date, there has been no Supreme Court decision on the statute. Existing case law indicates that use of the disparate impact model is appropriate for ECOA claims because discriminatory intent is often absent in credit discrimination. The *Miller* decision suggests that a plaintiff can prove an ECOA violation without establishing discriminatory intent or disparate impact. Whether ECOA claims will be limited to the models of proof used in employment discrimination or whether the more expansive *Miller* interpretation will be followed is unclear.

Examination of Title VII, Title IX, and the ECOA reveals that important statutory protections exist against sex discrimi-

nation in employment, education, and credit. This legislation may prove adequate to ensure equality for women, at least within the areas the Acts address. As we have observed, however, the efficacy of the statutes' protection depends upon a consistently broad reading of their language by the courts. A national mandate against sex discrimination is needed to guide the courts in interpreting this legislation and resolving the critical issues mentioned above. The defeat of the ERA, however, signifies political and societal reluctance to support such a mandate at this time.[306] But until a national policy of eliminating sex discrimination is adopted, women cannot be guaranteed adequate interpretation and enforcement of the existing statutory protections.

Laura Buckley

306. H.R.J. Res. 1, 98th Cong., 1st Sess., CONG. REC. H46 (daily ed. Jan. 3, 1983). The ERA was reintroduced in the House on January 3, 1983, but was defeated on November 18, 1983. The 278 to 174 vote fell short of the required two-thirds majority.